No. 18

In the Supreme Court of the United States

October Term, 1941

H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, and Harold L. Ickes, as Secretary of the Interior, petitioners

v.

Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company

SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REHEARING

INDEX

CITATIONS

In the Supreme Court of the United States

October Term, 1941

No. 18

H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, and Harold L. Ickes, as Secretary of the Interior, petitioners

v.

Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company

---

SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON REHEARING

The Government's main argument has already been presented in the brief filed at the last Term. This brief is submitted in order to reply more fully to several propositions advanced by respondents in their brief and at the argument.

I. THE FUNDAMENTAL ISSUE

Respondents urge that the transactions in coal here in issue are excluded from the operation of the Bituminous Coal Act, 50 Stat. 72, both because the regulatory provisions of Section 4 II do not

apply to such transactions and because the transactions are exempt under Section 4 II (l), which provides for the exemption of "coal consumed by the producer." Both contentions are based upon a single premise—namely, that the Act was not intended to regulate anything but sales and formal transfers of title, and that, therefore, any transaction which does not involve a sale or a formal transfer of title either does not fall within the scope of the regulatory provisions of the Act in the first instance or is expressly exempted from those regulatory provisions by Section 4 II (l).

In preparing our main brief, we assumed that respondents relied solely upon Section 4 II (l), and our brief was consequently devoted to establishing that respondents are not entitled to an exemption under the provisions of that section. The argument with reference to Section 4 II (l), however, specifically considers the question whether Congress intended to exclude from the scope of the Act all transactions involving no sale or other formal transfer of title (Br. 44-46); that discussion, showing that numerous provisions of the Act are incompatible with any such narrow construction, is directly applicable to respondent's argument based upon Section 4 II as a whole.

Respondents' contentions with respect to Section 4 II find no support in any express language of the Act. To the contrary, Section 4 specifically states that its provisions "are intended to regulate interstate commerce in bituminous coal,"

and that they shall apply to "*matters and transactions* in or directly affecting interstate commerce in bituminous coal." [Italics supplied.] Section 4 II (e) further provides that no coal subject to the provisions of the section "shall be sold *or delivered or offered for sale*" at a price below the minimum or above the maximum established by the Commission. [Italics supplied.] This section is entirely inconsistent with the view that the regulation is limited to transactions involving a sale or other formal transfer of title.

Respondents select isolated phrases used in various parts of the statute to demonstrate that the Act "concerns itself solely with commercial transactions in coal" (Br. 19); from this they reach the conclusion that only a transaction in which there is "a transfer by the producer of title to his coal" can properly be considered as commercial (*id.*). We may agree, at least for purposes of this case, that the Act is designed to regulate "commercial transactions" in coal. But we wholly disagree with respondents' further position that the transaction here in issue, because it was so arranged as to involve no transfer of title by the producer, is not a "commercial transaction." On the contrary, it was quite as much a commercial transaction, and quite as much a part of the competitive structure of the coal industry, as an outright sale of coal.

By stressing the technicality that there is in the present case no transfer of title by a producer,

and by failing to make clear the interdependence between the leases of the mineral rights and the contracts for the extraction of the coal, respondents suggest a misleading picture of the transactions into which they entered. The substance of those transactions, stripped of the legal formalism in which they were cast, is that respondents agreed to buy their coal requirements for a specified period (in one instance as short as sixteen days, in no instance longer than three years) from two persons—an owner of coal lands and a coal-mine operator—and to pay each separately. Instead of the coal-mine operator taking the mineral rights in his own name and simply selling the coal which he extracted to respondents, the mineral rights were put in the name of the respondents and were paid for directly by them to the landowner, thus technically avoiding a sale of the coal by the coal operator to the respondents. But the leases and contracts make clear that the substance of the transaction was no different from that of a sale and that the sole effect of placing the mineral rights in the name of respondents was to avoid a technical transfer of title from the operator to the respondents.

Respondents did not engage in the coal mining business. They did not make any investment in coal bearing lands.[1] They simply ordered what-

[1] Respondents' agreement to take all the coal produced from the lands during the term of the leases and contracts does not distinguish the transaction from a sale. A provision

ever coal they needed from the operator, the operator extracted it from the ground and delivered it to them, and they consumed and paid for it. In order to maintain the fiction that no sale was involved, they paid for the coal to two persons: they paid the landowner the standard royalty (which the coal operator would normally have paid) and they made the remainder of the payment to the coal operator. But, although two payments were involved, there was but a single "price" for the coal which the respondents bought. This is clearly shown by the contract provision for cancellation of the entire transaction if the price of the coal (royalty plus compensation to the contractor) exceeded the market price of similar coal and the contractor was unwilling to meet the price by reducing his compensation (R. 544–545, 327).

Respondents' brief urges that the transactions involved merely personal services and did not involve trade in coal as an article of commerce (Br. 21). This conclusion is reached through completely disregarding the leases and treating the contracts with the operators as arrangements for the "digging of coal" (*id.*). But the provisions of the leases and contracts themselves establish their interdependence beyond dispute and show that but a single deal, involving both a lease and an operating contract, was made with respect to

---

for the purchase by the vendee of the entire output of the vendor is, of course, frequently found in contracts of sale.

each mine. For example, the offer to assign the mineral rights in the Chilton mine to respondents was conditioned upon acceptance by respondents of an offer simultaneously made by Pritchard[2] to mine the coal and deliver it to respondents for a specified compensation (R. 242). Similarly, Pritchard's offer to mine the coal was conditioned upon acquisition by respondents of the mineral rights (R. 324). And the lease provided for its automatic termination upon termination of the operating contract for any reason whatever (R. 243–244).

It is manifest, then, that the parties intended the lease and operating contract to constitute integral parts of a single transaction. Consequently, respondents' arguments based upon the characteristics of the operating contract, considered separately from the lease, are both unrealistic and irrelevant. As this Court pointed out last term in discussing a comparable situation, "the two contracts must be considered together," because "to say they are distinct transactions is to ignore actuality." *Helvering* v. *Le Gierse*, 312 U. S. 531, 540. It is noteworthy that respondents have made no effort to show that the substantive effect of the lease and operating contract, considered as a single transaction, was not the same as that of

---

[2] Pritchard, in addition to being a coal operator, was president of the company which offered to assign the mineral rights (R. 544; 126, 131), and signed the offer in that capacity (R. 244).

an ordinary contract of sale. And we believe that, on the record in this case, no such showing can be made.

The respondents have not made any investment in coal lands; they are, therefore, in quite a different situation from a consumer which owns coal lands and engages a coal operator to mine the property.[3] The respondents have simply taken a short term assignment of mineral rights (in one case as short as 16 days) upon an agreement to pay royalties for all coal which is extracted; they have coupled this with a contract giving a coal operator the exclusive right to extract the coal during the period of the lease; and they have completely protected themselves against any decline in the market by providing that they shall have the right to cancel both the contract and the lease at any time that the composite "price" which they have to pay for the coal under the lease and the contract exceeds the market price. It is evident, therefore, that respondents bear none of the risks of ownership. And it is equally evident that they do not enjoy any of the privileges of ownership. The only right which the respondents secured by

[3] The Director of the Bituminous Coal Division has never made a determination whether, in that type of situation, the owner of the coal lands would be entitled to exemption from the Act, and no such determination need be made here. If such a case were to arise, the Director would doubtless inquire into all the facts with respect both to the ownership of the coal lands and the control and conduct of the mining operations in reaching his determination.

416168—41——2

virtue of the lease was the right to extract coal from the mine—yet under the terms of the lease and operating contract they could never exercise that right themselves. They were required, as a condition of securing the lease, to sign the contract, the effect of which was to give the mine operator the exclusive privilege of exercising their right to extract the coal. And they could never regain the right to extract the coal themselves, because the term of the lease was the same as that of the contract and any cancellation of the contract prior to its termination would automatically terminate the lease. Thus, considering the lease and contract together, all respondents actually received was a right to the coal itself after extraction from the ground—precisely what the vendee in an ordinary sale receives.

It is manifest, therefore, that the substantive effect of the transaction under review is that of a lease of the mineral rights to the coal operator and a sale of the coal extracted by the operator to the respondents, disguised in a somewhat different legal form in an attempt to evade the Act. Respondents' contention that this transaction was not "commercial" and not "part of the competitive picture" is, therefore, completely untenable. The fact, stressed in respondents' brief, that during the period of the lease and contract there was no competition among producers to sell coal to them is without significance. This is true in the case of any contract to purchase a commodity for a

specified period, for during the term of the contract the parties to it are *pro tanto* withdrawn from the competitive market. Clearly at the time that the contracts were made and renewed, respondents and the persons with whom they were dealing were in direct competition with other buyers and sellers on the commercial market, the standard for all being whether the price to be paid the contractor and lessor together was greater or less than the prices charged by other producers selling similar coal.

Moreover, it appears from the face of the contracts that even while they were in effect the contractors were forced to compete with other producers. For both the contracts and leases could be terminated by respondents whenever they could buy coal on the market at a price lower than the total price to be paid under the contract and lease arrangement. Certainly a person, whether he be called contractor or producer, who must reduce the compensation he is to receive in order to avoid losing a customer is in competition with another producer who may deprive him of his patronage by charging a lower price.[4]

---

[4] The contractor is from a practical standpoint in no different competitive position than a producer who has entered into a long-term contract of sale with a similar cancellation clause, or even than a producer who, without any contract, has regular customers whom he has supplied for a long period and will continue to supply so long as he meets his competitors' prices.

It is thus clear that if we accept respondents' premise that the Act applies only to commercial or competitive transactions, the arrangement devised comes within that category. Realistically considered, the very type of commercial transaction in coal which the Act was designed to regulate has taken place. Consequently, the Director's determination that the Act is applicable, despite the particular form which the deal took, cannot be said to be without rational foundation or to misconceive the Congressional purpose in enacting the statute.

In this connection, we wish to emphasize the possibilities for evasion which are inherent in the scheme. The device is just as applicable to small amounts of coal as it is to the requirements of the Seaboard Railway. A consumer desiring 100 tons of coal, for example, need only arrange for the purchase in the form of a lease of mineral rights and an operating contract, instead of in the form of an ordinary contract of sale, and, under respondents' contentions, the price provisions of the Coal Act become inapplicable. It is significant that 24 applications for exemption, on grounds similar to those upon which respondents rely, have been filed with the Director. One of these applications seeks exemption for a transaction involving as little as 6,200 tons of coal. *Application of Morgantown Glassware Guild*, No. 1463 F. D., filed October 16, 1940.

2. RESPONDENTS' ARGUMENT BASED UPON THE PROVISIONS OF SECTION 3

To support their argument that the Act applies only to sales or other technical transfers of title by the producer, respondents rely upon the provisions of Section 3. They urge that the transactions into which they entered are not subject to the taxing provisions and penalties of Section 3, that Congress could not have intended to subject to the regulatory provisions of Section 4 transactions not subject to the tax sanctions of Section 3, and consequently that the transactions should be held excluded from the scope of Section 4.

The argument fails because its basic premise—that the transactions are not subject to the taxing provisions of Section 3—is without foundation. Section 3 taxes the "sale or other disposal" of bituminous coal. This provision clearly covers the present case. The transactions here in issue, since they are sales in substance, may well be considered sales within the meaning of Section 3. But even if they may not be considered as sales, they must certainly be considered as a "disposal" of the coal. By virtue of the transactions, respondents became entitled to receive, and did receive, for use on their railroad system coal which, at the time they made the deal, was still in the ground and in which they then had no right, title, or interest. If "disposal" denotes anything broader than a formal sale, as it clearly does, it must cover this type of situation.

Respondents argue to the contrary on the basis of the provision in Section 3 which provides:

> The term "disposal" as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.[5]

But this provision, as its wording shows, was not designed as an exclusive definition; its obvious purpose was to give the term "disposal" a broader construction than it might otherwise have received. Congress has not said, as respondents suggest, that disposal "means" only consumption or transfers of title by a producer; it has said rather that the term disposal "includes" consumption and any transfer of title by a producer. As respondents themselves state in their brief in another connection (Br. 41), "the use of the term 'includes' obviously excludes the construction that the definition * * * in this section 3 is all-embracing." Cf. *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125; *Phelps-Dodge Corp.* v. *National Labor Relations Board*, No. 387, October term, 1940, decided April 28, 1941. And, to quote respondents again (Br. 44), since "means" instead of "includes" is contained in other statutory definitions (Section 17).

---

[5] Section 17 contains a general list of definitions of terms "as used in this Act." The definition of "disposal" in Section 3 defines that term only "as used in this section." It is thus clear that the definition in Section 3 applies only to that section and not to the remainder of the statute.

"the absence of that word" in the definition in Section 3 "forcefully demonstrates that the definition * * * is not all-embracing."

3. RESPONDENTS' ARGUMENT THAT THEY BEAR THE BURDEN OF THE MINING OPERATIONS

In connection with their argument that they are the "producer" of the coal which they consume within the meaning of Section 4 II (l), respondents urge that they are engaged in the business of mining because they bear most of the costs of the mining operation. Respondents concede that the contractors bear all the costs in the first instance, but the decisive fact is alleged to be that the respondents are obligated by the contracts to bear the ultimate burden of most of the expenses. They rely particularly on the provisions of the contracts that the amount to be paid shall be adjusted to take into account increases or decreases in those cost items which are beyond the control of the contractor—in particular, wages, taxes, power rights, and the average costs of the materials purchased (e. g., R. 262, 269–271).

These facts in no way support the contention that respondents are the "producer" of the coal they consume. In the case of any business which is not operated at a loss, the purchaser of the product ultimately bears all of the costs of operation. But this plainly does not convert the purchaser into the manufacturer of the goods. And similarly, the fact that the price agreed upon for the

goods is flexible or that it is adjustable so as to take into account cost items not within the control of the parties does not serve to put the consumer into the business in which the producer is engaged. Such cost-plus provisions are frequently found in ordinary contracts of sale. See *United States* v. *Driscoll*, 96 U. S. 421; *Kruse* v. *Revelson*, 115 Ohio St. 594; Note, 55 A. L. R. 291.

Respondents contend (Br. 46) that the contracts reserve to them control over the contractors' accounting and also recognize their right to control salaries and rates of pay which are within the control of the contractor. Insofar as accounting is concerned, the contracts merely provide that the respondents shall be given full access to the accounts of the contractor, and that the contractor will keep the records in such a way as to enable the receiver to ascertain the costs.[6] These provisions of the contracts merely permit the respondents to verify the contractor's statements of ac-

---

[6] Paragraphs 9 and 10 of the contracts, referred to in respondents' brief, read as follows (R. 303, 265):

"9. The Receivers, or their authorized representatives, shall be given full access to the property, records, and accounts of the Contractor at all times for the purpose of enabling them to ascertain the Contractor's costs, and the Contractor agrees that he will cause his records and accounts to be kept up to date and in an efficient way that will readily enable the Receivers to ascertain such costs.

"10. The Receivers shall have the right to keep an accountant and or inspector at the mine at their expense, and the Contractor agrees to provide suitable working quarters."

count and do not vest in respondents "control over the account." Cf. *United States* v. *Driscoll, supra.*

The contracts originally entered into did contain provisions that the contractors would submit to the respondents a schedule of the rates of pay and salaries over which the contractor has control and that such rates would not be put into effect or changed without respondents' written approval (R. 262, 300, 326). This provision, however, was eliminated in the renewal of the contract for the Glamorgan Mine in 1937 (cf. R. 188–189 and 195 with R. 262, 270), and apparently was eliminated from the contract for the Chilton Mine as redrafted in 1937 (cf. R. 314–315 with R. 299–300).[7] This indicates that the provision was not regarded as of much, if any, consequence. Moreover, since the detailed description in the record as to how the parties operated under the contracts contains no reference to any exercise by respondents of control over the contractors' salaries or wages, it is apparent that the provisions were in fact ignored.

---

[7] Although the renewal of the Chilton contract in April 1937 does not state specifically that Paragraph 7 (a) of the original contract (R. 299–300) was to be replaced by Paragraph 3 of the renewal (R. 314–315), a comparison of those two paragraphs shows that Paragraph 3 is in fact a complete substitute for Paragraph 7 (a). The subparagraph relating to respondents' control of salaries and wages is the only one completely eliminated.

4. THE EXTENSION OF THE STATUTE

In the Government's petition for rehearing, the Court's attention was called to the fact that the Bituminous Coal Act, which would otherwise have expired by its own terms on April 26, 1941, was extended shortly after the order of affirmance was entered in the case at bar. The House of Representatives had passed the bill on March 27, 1941, prior to this Court's decision. Thus only the Senate was able to give any consideration to the effect of this case upon the pending legislation.

It is evident that the failure to amend the Act at that time was not a manifestation of Congressional approval of the decision of the Circuit Court of Appeals or of this Court. The Senate Committee (S. Rept. No. 169, 77th Cong., 1st Sess.) dealt with this precise question:

> Subsequent to the passage of H. R. 4146 by the House of Representatives, but 2 days prior to the beginning of the hearings before the subcommittee, the Supreme Court announced its decision in the case of *Gray* v. *Powell and Anderson*. This case involved the question whether a railroad which had leased coal and had engaged persons to mine the coal as "independent contractors" for shipment to and consumption by the railroad, was exempt from the regulatory provisions of the act as the "producer" of this coal. The question rested upon construction of various provi-

sions of the act, particularly sections 4 II (l) and 17 (c). The Circuit Court of Appeals for the Fourth Circuit, reversing an order of the Director of the Coal Division, held that the railroad was exempt. The Supreme Court was equally divided, there being a vacancy on the Court, with the result that the decision below was affirmed. The Department of Justice has indicated that it will petition for rehearing before a full bench of nine justices and ask that disposition of its petition await filling of the vacancy which now exists on the Court. The action of your committee in reporting favorably H. R. 4146 to extend the Coal Act for a period of 2 years is not intended, either expressly or by implication, as ratification or approval in any respect of the interpretation of the act by the Fourth Circuit Court of Appeals or the Supreme Court of the United States in the case in question.

The failure of the Senate to amend the bill as it passed the House so as expressly to disapprove of the result reached by the court below in this case is explained by the urgent need for dispatch in the enactment of the measure. In the Senate report the Committee stated (p. 4):

> It is particularly important that expeditious action be taken to extend the life of this act because it expires on April 26, 1941, and because extension of the act may assist in the prompt adjustment of the differences

> between the mine workers and operators which have led to a suspension of the mining of bituminous coal.

And on the floor of the Senate, Senator Barkley urged that the bill not be amended in any fashion because this would mean that it would have to go back to the House for reconsideration, with a resultant delay in final enactment of the measure. 87 Cong. Rec. 3096, 3097 (advance ed.).

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ROBERT L. STERN,
RICHARD H. DEMUTH,
Special Assistants to the Attorney General.
ARNOLD LEVY,
General Counsel,
JESSE B. MESSITTE,
Assistant General Counsel,
Bituminous Coal Division, Department of the Interior.

U. S. GOVERNMENT PRINTING OFFICE: 1941